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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/17/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARIA HUERTA,)	No. 1 CA-IC 10-0025
)	
Petitioner,)	DEPARTMENT B
)	
v.)	MEMORANDUM DECISION
)	
THE INDUSTRIAL COMMISSION OF ARIZONA,)	(Not for Publication -
)	Rule 28, Arizona Rules
Respondent,)	of Civil Appellate
)	Procedure)
DICK WALKER PAINTING,)	
)	
Respondent Employer,)	
)	
WESCO INSURANCE COMPANY,)	
)	
Respondent Carrier.)	
)	

Special Action - Industrial Commission

ICA Claim No. 20091-890234

Carrier Claim No. 420961-1

Administrative Law Judge Stephen W. Pogson

AWARD SET ASIDE

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G E M M I L L, Judge

¶1 Petitioner employee Maria Huerta ("Claimant") seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a non-compensable claim. Because we conclude that the evidence does not support the ALJ's findings regarding the doctor's testimony and that a specific finding on the credibility of Claimant should have been made, we set aside the award.

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We review the ALJ's factual findings using a deferential standard, but we review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003).

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Claimant was employed as a painter by the respondent employer, Dick Walker Painting Specialists ("Walker"). On July 1,

2009, Claimant was working as part of a crew painting a house in Gilbert. At 10 a.m., Claimant broke for lunch with the rest of the crew. She testified that one member of the crew wanted to sit in the shade, so she moved a five-gallon paint bucket into the shade to sit on. Claimant described the paint bucket as being two to three feet tall and weighing fifty to sixty pounds.

¶4 When Claimant lifted the bucket, she immediately felt stabbing low back pain. She testified that she did not tell anyone at the time, because it did not seem very bad. Claimant stated that she finished her lunch, finished her work shift, and drove herself home. She stated that her supervisor, Ramon ("Tony") Yanez, did comment that she seemed to be working slowly that afternoon.

¶5 Claimant was scheduled to work the next morning, July 2. When she got up that morning, she had severe low back pain. She stated that when she tried to sit down on the toilet, severe pain radiated down both of her legs. She asked her sixteen-year-old daughter to call her supervisor, Ron Collins, and tell him that she was injured and was going to the hospital. Claimant's daughter drove her to the hospital, where an MRI revealed a herniated disk at L5-S1, and she underwent emergency surgery. After her surgery, Claimant called Collins to report the work incident. She testified that he became angry and asked her why she had not told him before.

¶6 Claimant's daughter, Lizette Huerta, testified that when

her mother got home on July 1, she mentioned that she was in pain from having lifted a bucket at work. She stated that by the following morning, her mother's pain was so severe she had to drive her to the hospital.

¶17 Walker's superintendent, Ron Collins, testified that on July 1, Claimant was working on a company project painting a garage. He stated that there were eight or nine five-gallon paint buckets inside the garage. Collins testified he spoke with Claimant several times on July 1, but she mentioned only that her calves hurt. The next day, he received a phone call from Claimant's daughter telling him that her mother would not be at work that day because she was going to the hospital. He stated that Claimant called him on July 3, and told him that she had undergone emergency back surgery. Collins testified that she asked him to notify their boss that she was hurt, but she did not mention how she had been injured.

¶18 Collins testified that if he had been aware at the time that Claimant sustained a work-related injury, he would have filled out the appropriate reports. He also stated that he frequently held tailgate safety meetings to remind employees about immediately reporting on-the-job injuries to their supervisor. Finally, with regard to the paint buckets, Collins agreed that it was possible that someone had moved one outside of the garage to mix or pour paint.

¶9 The other crew members who worked with Claimant on July 1 also testified. Yanez, the lead person, testified that the crew ate lunch in the garage. Claimant was present, and she sat on a five-gallon paint bucket. He testified that he did not see her move the paint bucket. Further, Claimant did not mention an injury or appear to have any difficulty performing her work that day. Miguel Cordova Hernandez, a spray painter, testified that the crew ate lunch in the garage sitting on the five-gallon paint buckets. He stated that he never saw Claimant move a bucket, nor did she say that she was hurt or appear to be injured. Mario Alberto Flores testified that Claimant told him that she had hurt her back at the gym on June 30, 2009.¹

¶10 Kris Allen Smith, M.D., a board-certified neurosurgeon at Barrows Neurosurgeon Associates, testified that he first saw Claimant in the emergency room on July 2, 2009. Dr. Smith remembered that when he first saw Claimant, she was in severe pain and was unable to walk. He recorded the following history:

HISTORY OF PRESENT ILLNESS: The patient is a 36-year-old female with a one day history of low back pain, radiating bilaterally to her lower extremities, worse on the right than on the left. The patient reports that she developed a pain after lifting a 5-gallon bucket of water yesterday while at work.^[2] Following the episode she experienced

¹ Mr. Flores' testimony is inconsistent with the gym records from Fitness West, which were filed in evidence on December 17, 2009, and indicated that Claimant last went to the gym on June 28, 2009.

² Dr. Smith in his testimony referenced Claimant having lifted a five-gallon bucket of paint the day before she presented at the

pain and difficulty urinating. She went to the emergency department with pain. She was straight catheterized with a post void residual of 300 mL [sic].

* * * *

SOCIAL HISTORY: She is a painter. She lives with her daughter.

¶11 Dr. Smith admitted Claimant to the hospital and performed an emergency microdiscectomy at L5-S1. He stated that the reason for the emergency surgery was Claimant's difficulty voiding urine or moving her right leg, both of which indicated sacral nerve root compression.

¶12 Dr. Smith testified that the mechanism of injury described by Claimant as occurring on July 1 was "very consistent" with causing the herniated disc. He also explained that, based on the history she provided him, she suffered a tear in the annulus around the disk when she lifted the bucket, which would cause a sharp, acute pain. Dr. Smith further explained that an increase in pain can be caused by the muscles relaxing or by a change in position that causes more of the disc material to herniate through the annular tear and compress the nerve root. He stated that the development or progression of Claimant's condition was "definitely consistent" with a herniated disc.

hospital. Also, other portions of the emergency room records report that Claimant lifted a "water" bucket and immediately felt low back pain but was able to finish her work shift.

¶13 In response to a hypothetical question on cross-examination, Dr. Smith testified that when Claimant got up to use the bathroom on July 2, 2009, that activity probably exacerbated her condition by allowing additional disc fragments to herniate out of the annular tear. The doctor was further asked if "straining" on the toilet could cause an annular tear or a herniated disc. He answered: "It can certainly worsen the symptoms of one. I'm not certain that it could cause a tear completely on its own." Finally, the doctor stated that in giving his causation opinion relating Claimant's herniated disc to her work, he presumed the accuracy of her history.

¶14 Following the hearings, the ALJ entered an award for a non-compensable claim. Two of his pertinent findings are numbers 9 and 10:

9. Dr. Smith, a board certified orthopedic surgeon, testified that the herniated disc could have been caused by a lifting incident as described by applicant. He also testified that applicant could have sustained the injury from strain while sitting on the toilet on July 1, 2009.

10. Dr. Smith's opinion does not cut one way or the other. We are left with testimony of several witnesses, none of whom are disinterested. This is a close case, but I find that applicant has failed to sustain her burden of proof. The fact that she was able to continue working the afternoon of July 1, 2009, and drove home without incident weigh slightly against applicant and her claim. I am also influenced slightly by the fact that applicant's daughter did not tell Mr. Collins that applicant had been injured on the job or that an on-the-job incident was at least partially responsible for her symptoms. It certainly would

have been logical for applicant to tell Lizette and for Lizette to tell Mr. Collins, even if she was not trying to commence a claim process.

Claimant timely requested administrative review, but the ALJ summarily affirmed his award. Claimant next brought this appeal.

ANALYSIS

¶15 The statutory elements of compensability are an injury by accident arising out of and in the course of employment. See A.R.S. § 23-1021(A) (Supp. 2010). It is Claimant's burden to prove all elements of a compensable claim. *E.g., Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). In this case, the ALJ found that Claimant had failed to sustain her burden of proving a work-related injury. To support that finding, he stated that Dr. Smith's opinion "does not cut one way or the other," and the remainder of the witnesses were not disinterested and their testimony conflicted.

¶16 The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). It is his duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). While the ALJ is not required to make a specific finding on every issue, he must resolve the ultimate issues in the case. See *Cavco Indus. v. Indus. Comm'n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981).

¶17 After reviewing the briefs of the parties and the record

in this case, we conclude that the evidence does not support the ALJ's findings regarding Dr. Smith's testimony and that the ALJ erred by not making a finding regarding Claimant's credibility.

¶18 Dr. Smith testified that Claimant's annular tear-herniated disc injury was "very consistent" with the lifting incident described by Claimant. He also testified that the progression of Claimant's symptoms from the afternoon of July 1 to the morning of July 2 was "definitely consistent" with a herniated disc at L5-S1. Dr. Smith further explained why a person could sustain a herniated disc on day one and then experience more severe pain, radicular symptoms, or urinary problems on day two:

What happens is there's a tear in the annulus around the disk and that will cause a sharp acute pain, but then later on sometimes when the muscles relax or when there's just a different change in position, then more of the disk actually herniates out through that initial tear, and that additional fragment of material causes the compression of the nerve root and the additional symptoms.

¶19 The ALJ found that Dr. Smith testified that Claimant "could have sustained the injury from strain while sitting on the toilet." In the doctor's testimony, the potential of "strain" on the toilet was introduced in defense counsel's question. We are unable to locate in the doctor's testimony that he said Claimant could have sustained the injury from strain on the toilet. Dr. Smith's specific answer to the question whether such straining could cause an annular tear or herniated disc was: "It can

certainly worsen the symptoms of one. I'm not certain that it could cause a tear completely on its own." Accordingly, we conclude that the evidence does not support this important finding by the ALJ regarding Dr. Smith's testimony.

¶120 The ALJ also found that Dr. Smith's testimony did "not cut one way or the other." In our view, such a finding could be made only if the ALJ had concluded that Claimant's testimony was not credible. But no specific finding regarding credibility was made.

¶121 An ALJ must make findings on all material issues in dispute. *Post v. Industrial Comm'n*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989). A specific credibility finding is necessary when credibility is a material issue. *Villanueva v. Indus. Comm'n*, 148 Ariz. 285, 287-89, 714 P.2d 455, 457-59 (App. 1985). Further, this court has held that it will not imply a credibility finding rejecting a claimant's credibility. See *Joplin v. Indus. Comm'n*, 175 Ariz. 524, 528, 858 P.2d 669, 673 (App. 1993).

¶122 Here, Claimant's credibility was a material issue in determining whether she had sustained a compensable injury. As recounted above, Claimant's coworkers testified she said nothing about an injury occurring at work, and none of them testified they saw her move the paint can. She was able to finish her work and drive home. On the other hand, Claimant's testimony and the testimony of her daughter support the conclusion that she awoke on

July 2 with increased pain, which Dr. Smith testified is consistent with the injury claimant described as occurring on July 1. The medical records also show that in providing her history at the hospital in the early morning of July 2, Claimant consistently reported she had suffered an injury when lifting the day before. Finally, Dr. Smith's testimony that the progress of Claimant's condition was consistent with her account of the July 1 incident also supports Claimant's credibility.

¶123 If Claimant's testimony was credible as assumed by Dr. Smith, it provided solid foundation for Dr. Smith's causation opinion which related her annular tear and herniated disc to the work-related lifting incident. If she was not credible, then there was no foundation for the doctor's opinion because he testified that he relied on her testimony in reaching his opinions. See *Desert Insulations v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982) (an inaccurate factual background can preclude medical testimony from constituting substantial evidence to support an award).

CONCLUSION

¶124 Because the evidence does not support the ALJ's findings regarding the testimony of Dr. Smith and because the ALJ did not make the necessary finding regarding Claimant's credibility, we set

aside the award.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge